1989

Patricia G. Smith (Taylor) v. Scott G. Smith : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OF THE STATE OF UTAH

PATRICIA G. SMITH (TAYLOR,) :

Plaintiff-Respondent, :

vs. :

SCOTT G. SMITH : Case No. 890[redacted]-CA

Defendant-Appellant. : Category 7

APPEAL FROM THE FINAL ORDER OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
HON. RAY M. HARDING.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations matter pursuant to Utah Code Ann. § 78-2a-3 (2) (g) (Supp. 1989).

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in granting plaintiff-respondent's motion in limine, which motion precluded defendant-appellant from introducing evidence at the hearing regarding plaintiff-respondent's contempt from the time the parties were divorced on April 13, 1981 until plaintiff-respondent was found in contempt of Court for her failure to allow visitation to defendant-appellant, which order was entered by the Court on December 14, 1984?

II. Did the trial court err in failing to find a material change of circumstances when it only considered plaintiff-respondent's contemptuous behavior since December 14, 1984 and not since the decree of divorce which was entered on April 13, 1981?

III. Did the trial court err in failing to find that plaintiff-respondent's interference with defendant's visitation rights constituted a substantial and material change in circumstances which supports a change of custody?

DETERMINATIVE STATUTES

Utah Code Annotated, § 30-3-10(1) and (2) (1988), and Rule 52 Utah Rules of Civil Procedure (1988) are the applicable statutes in this matter, copies of which are included at Appendix "A".

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND DISPOSITION AT TRIAL COURT

This is an appeal from an Order of the Fourth Judicial District Court, in which the Honorable Ray M. Harding ruled that defendant-appellant's (Scott Smith) Petition to Modify the Decree of Divorce be dismissed in that there was not a showing of a material change of circumstances to warrant a change in custody of the parties' minor child Jesse) from plaintiff-respondent (Patricia Taylor), to Scott Smith.

Scott Smith appeals from this ruling stating that the true nature of the circumstances was never presented to the court in connection with petition to modify custody due to the Court granting a Motion in limine excluding prior evidence of visitation violations.

B. COURSE OF THE PROCEEDINGS AND RELEVANT FACTS.

On April 13, 1981 the Honorable J. Robert Bullock, of the Fourth Judicial District Court of Utah County, entered a Decree of Divorce to the captioned parties. Scott Smith was not present at the hearing but

had filed a Consent and Waiver for Entry of Judgment with the Court. At the hearing Patricia Taylor was granted the custody of the parties' minor child, Jesse, and Scott was granted reasonable visitation. (R. 12-16).

On August 14, 1981 the Honorable Maurice Harding of the Fourth Judicial District Court held a hearing on Scott's Motion for Order to Show Cause filed July 20, 1981, (R. 19) and entered an Order Modifying Decree (R. 27-28) which specifically defined Scott's visitation.

Following the August 14, 1981 Order to Show Cause Hearing Patricia Taylor and Jesse moved to Mexico, (R. 506-7), and later to the State of Arizona, (R. 507-8), both moves seriously frustrating Scott's visitation rights. Scott sought the aid of the Court in enforcing his visitation rights through another Order to Show Cause Hearing, which was subsequently heard on August 17, 1982 before Judge Bullock. Scott was ordered to pay child support to the Court because of the difficulty of locating Patricia. (R. 79-80).

Scott continued to have difficulty with his visitation and petitioned the Court for an Order to Show Cause hearing on August 13, 1984. Scott questioned why Patricia should not be held in contempt for her failure to allow Scott visitation after she moved to Mexico and then relocated herself and Jesse to the State of Arizona without notifying Scott of Jesse's whereabouts. (R. 89-91). The hearing held before Judge Bullock on October 3, 1984 was continued to a later date. (R.98-100).

On December 11, 1984, both parties appeared before Judge Bullock

ınd an Order Modifying Decree was entered on December 14, 1984. In the)rder Scott's visitation was set forth in greater detail and Patricia 'as found to be in contempt of Court for her deliberate denial of cott's visitation rights. (R. 158-65).

On June 21, 1988, Scott filed a Petition to Modify the Decree of ivorce based on Patricia Taylor's continued attempts to thwart his isitation with his son. Scott represents that such actions constitute material change of circumstances which justifies awarding a change of ustody of Jesse. (R. 294-98).

On July 27, 1988, Patricia, through her counsel in Texas, filed a otion to Stay Proceedings arguing that custody should be determined in exas. (R. 306-13). Judge Harding entered a Memorandum Decision enying the Motion to Stay Proceedings in that Utah will retain urisdiction of the matter. (R. 359-60).

On December 9, 1988, Patricia filed a Motion for Summary Judgment R. 402-3) which was later denied due to issues of material fact which eeded to be presented to the Court. (R. 405).

On December 13, 1988, prior to the trial, an informal conference as held in the chambers of Judge Harding where the Court considered atricia Taylor's motion in limine to restrict evidence prior to ecember 14, 1984. The motion in limine was granted. Due to the motion ı limine Scott was unable to present evidence to support his petition)r custody. Scott's petition was dismissed, and Patricia was still)und to be in Contempt of Court. (R. 405-6).

On April 28, 1989, Scott Smith filed his Notice of Appeal from the

decision rendered by Judge Harding. (R. 444).

SUMMARY OF ARGUMENT

Due to the fact that the original divorce decree was entered by default the issue of custody was not fully examined by the court. The best interests of the child were not litigated.

The first time the issue of custody was brought before the Court was June 21, 1988. Scott Smith argued that his former wife's persistent and malicious interference with his visitation rights constituted a material change in circumstances warranting a change in custody. The bulk of Scott's evidence was excluded because the Court determined that the evidence had already been heard. In so ruling the court erred; although the evidence had been heard in regards to contempt proceedings, it has never been presented in relation to the issue of custody.

The Court further erred in holding that interference with visitation was not a material change of circumstance. Had the Court heard all the relevant evidence it could only have concluded that the best interests of Jesse Smith would not be served by Patricia Taylor.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO REVIEW THE ENTIRE RECORD

A. The Change-In-Circumstances Inquiry Is Less Restricted In Non-djudicated Custody Awards.

When Scott Smith petitioned the Court to Modify the Divorce Decree n June 21, 1988, it was his first attempt in seeking the physical care, ontrol and custody of Jesse. Since the initial decree of divorce in pril 1981, all modifications to the final order of the court were for ie purpose of more specifically detailing Scott's visitation rights. cott has attempted, but has not been afforded, the opportunity of resenting to the Court his reasons for pursuing custody and having the ourt determine that he is a fit and proper parent to be awarded custody his son Jesse.

Custody modification is an area in which a petitioning party has high threshold to overcome before the courts will consider changing original decree. In establishing this threshold of stability, the urts have relied upon a two-pronged test for modification of custody, tlined in *Hogge v. Hogge,* 649 P.2d 51 (Utah 1982). As a means of creating nsistency in custody disputes, the test requires a finding of material ange in circumstances from which the initial custody was based before e order is opened to determine the best interests of the child.

Maughan v. Maughan, 102 Utah Adv. Rep. 44, 770 P.2d 156 (Utah App. 1989) has emphasized the importance of this test: "If the initial award was based on a thorough examination by the trial court of the various factors pertaining to the child's welfare, a rigid application of the change-in-circumstances prong is in order." In the case before the court the initial custody award of Jesse Smith was not based on a thorough examination of factors pertaining to the child's best interests. Accordingly, a less rigid application of the change-in circumstances test is appropriate.

Scott realizes the importance of the change-in-circumstances standard and he attempted to set forth evidence which supported his claim of a material change, but was hindered by the Court's granting of a motion in limine. The issue Scott now raises is one which Supreme Court Justices Stewart and Howe referred to in their concurring opinions in *Kramer v. Kramer,* 738 P. 2d 624 (Utah 1987). In that case the Justices cautioned a rigid application of the "change-in-circumstance" requirement while agreeing with the need for the standard established in *Hogge*. Justice Stewart acknowledged the requirements of *Hogge* as a means to prevent repetitive custody disputes and to aid in fostering family stability. He further recognized that in some instances a strict application of the requirements in favor of stability could ultimately be more detrimental to the interests of the child then the effects of changing custody. Justice Howe noted several circumstances where strict compliance to *Hogge* would in essence impede the best interests of the

child. Among his examples he specifically voiced his "concern in cases where a divorce decree and custody of a child is obtained by default. In such instances there is no determination made by the court as to which parent would be superior in raising the child." *Id.*

Scott desires to be given the opportunity to present evidence which supports his claim to custody of Jesse based on the fact that this issue has not been fully litigated before the Court. In the initial custody determination Scott simply executed a Consent and Waiver for Entry of Judgment and the custody award was obtained by default. Evidence was not presented to suggest that Jesse's best interests were thoroughly examined prior to the original award of custody nor to determine the fitness of Scott as a parent.

The application of the *Hogge* two-prong test was questioned recently in *Bake v. Bake,* 106 Utah Adv. Rep. 39 (Ct.App 1989). Neal and Vickey Bake were granted a divorce on August 19, 1985, and pursuant to their stipulation the original decree awarded custody of their two sons to Neal under the provision that if the boys later decided that they would like to live with their mother custody could be changed without a need to show a change of circumstance. The boys eventually did decide they wanted to live with their mother and she filed a petition to change custody. The Court granted Vickey's petition and Neal appealed stating that the trial court erred in not applying the two-prong test of *Hogge.*

On appeal this Court referred to *Maughan, supra. 7,* "the scope of the

change-in-circumstances inquiry is less restricted when the initial custody award was not premised on an examination of the child's best interests." *Id.* at 46. The custody of the Bake children was not examined but rather based on the parent's stipulation, and under these circumstances the court could "accept a greater range of evidence under Hogge's first prong regarding the initial custody arrangement, the events that have since transpired, and the resulting effects on the child." *Id.* Likewise, in the case at hand, Scott was not granted the opportunity to present evidence regarding the initial decree, the events that transpired since the initial decree, or the overall effects his limited visitation has had on his relationship with his son.

In granting Patricia's Motion in Limine the Court stated that evidence prior to December 14, 1984, was heard by the court in the contempt hearing and that the presentation of any evidence in that regard was unnecessary. (R. 589 at p. 4-7). But in contrast to this decision, the Court of Appeals has ruled that when custody determinations are not adjudicated the res judicata policy underlying custody is given less weight, and that the res judicata aspect of the changed-circumstances rule "must always be subservient to the best interests of the child. . . When a child's custody is determined by stipulation or default, the custody determination may in fact be at odds with the best interests of the child." *Elmer v. Elmer,* 107 Utah Adv. Rep. 37 (Ct.App. 1989). At no time during the pendency of this case in the Fourth District Court was an impartial determination made as to the best

interests of the child. For this reason Scott wishes to present all the evidence to the Court which would support adequate findings upon which a custody award can be based.

B. The Findings Of The Court Should Set Forth The Facts Upon Which The Ultimate Decision Was Based.

Utah R. Civ. P. 52 (1987) states the purpose and guidelines for findings by the court:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon,. . .in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

This Court recently addressed the issue of adequate findings in *Jensen v. Jensen,* 110 Utah Adv. Rep. 27 (Ct.App. 1989). Raymond and LaRae Jensen were divorced on February, 10, 1987, and Raymond was awarded custody of the parties three minor children, as well as LaRae's two children from a previous marriage, which Raymond had adopted. In June 1987 LaRae sought custody of the children. On October 15, 1987, the decree was amended to award custody of the two older children to LaRae based on the agreement in the initial decree that the two older children could elect to have custody changed. The Court determined that there was not a material change of circumstance to warrant changing custody of the three younger children so they remained with Raymond. The trial court failed to make findings regarding the portion of the petition relating to the younger children, and LaRae appealed from that portion

of the order.

In seeking custody of her younger children LaRae relied upon the theory of changed circumstances, but "other than an unsigned statement by the court that Raymond is still the primary caretaker, the trial court's order neither discusses LaRae's evidence in support of her affidavit, nor compares that evidence with the factors underlying the original award." *Id. at 28.* The initial custody award findings did not detail the reasoning for the Court's decision; it simply concluded that Raymond was a "proper parent to be awarded the care, custody and control of the minor children." *Id. at 29.* With only the statement of Raymond being a proper parent there was not a means of comparing the initial decree with LaRae's claimed change in circumstances. The Court ruled:

> Because there is simply insufficient factual grounds expressed to conclude whether a change of circumstances has been demonstrated, we are compelled to remand the case to the trial court for entry of appropriate findings. Those findings should articulate the considerations behind the initial award of custody and the order denying modification, and should reflect the current legal standard for modification of custody.

Id. at 29. The Court vacated the trial court's order denying LaRae's petition and remanded for entry of appropriate findings.

The importance of appropriate findings is emphasized in *Smith v. Smith,* 726 P.2d 423, 426 (Utah 1986):

> To ensure that the trial court's custody determination, discretionary as it is, . . . is rationally based, it is essential that the court set forth in its findings of fact not only that it finds one parent to be the better person to care

for the child, but also the basic facts which show *why* that ultimate conclusion is justified . . . Proper findings of fact ensure that the ultimate custody award follows logically from, and is supported by, the evidence and the controlling legal principles. Adequate findings are also necessary for this Court to perform its assigned review function.

In *Smith* the Supreme Court of Utah reversed and remanded the trial court's order due to the fact that the written findings and statements did not constitute adequate findings. Another recent case explains: "Adequate findings are those that (1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached, (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous." *Marchant v. Marchant,* 743 P.2d 199, 203 (Utah App. 1987). Unless the findings meet this standard, the issue of custody must be reversed. *Id.*

A review of the findings of fact in the matter currently before this Court clearly shows the above standard was not met. The Findings of Fact and Conclusions of Law filed from the initial decree of divorce Appendix "B"), stated that Patricia (Smith) Taylor was "a fit and proper parent and should be awarded the sole care and custody of the minor child of the parties," and granted Scott Smith "reasonable visitation," (R. 12-14). The Findings of Fact entered by the Court on Scott's petition to modify (Appendix "C"), stated both parents were fit, and there was not a material change of circumstances warranting a change of custody. (R. 436-438). In applying the standard for "adequate findings" to this case: (1) The Court failed to provide sufficient detail, simply disclosing that both parents were fit, and that there was

no material change of circumstances; (2) The findings failed to state the basis for its determination that there was not a material change, and did not disclose the process by which the Court reached this decision; (3) There is no indication that the process is logical or supported; (4) There was not enough evidence presented to the court to determine if a change of circumstances clearly exists. The findings having not met this standard, the issue of custody must therefore be reversed. *Marchant, supra.*

The initial award of custody, as previously stated, was not fully litigated due to the fact that the decree and award of custody were entered by default. There have been modifications to the initial decree in attempts to reconcile problems associated with Scott's visitation, but the only instance in which Scott has attempted to change custody of Jesse is the decision from which he now appeals. Had the trial court heard the entire record it would have been better able to determine the true nature of the claimed change-in-circumstances.

POINT II

INTERFERENCE WITH VISITATION CONSTITUTES A MATERIAL CHANGE IN CIRCUMSTANCES WHICH SHOULD WARRANT A CHANGE IN CUSTODY

It is well established that the prime concern of the courts in any custody matters is the welfare of the children and the standard is "the best interest of the child." Utah Code Ann. § 30-3-10. In *Pusey v. Pusey,* 728 P.2d 117 (Utah 1986), the Supreme Court stated that the "best

.nterest" standard should be based on function-related factors, and ·eferred to Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts,* .8 Fam.L.Q. 1 (Spring 1984), for those factors. The Atkinson article liscusses the interference with visitation problem specifically. The ·easoning goes as follows: Simply because two individuals have letermined they can no longer continue their lives together does not :liminate a child's need to have an association with both parents.)uring the process of obtaining a divorce where a child is involved it s the child who suffers the greatest loss and disruption. Upon order f the court one parent is awarded custody and the other is granted isitation rights in hopes that the child will be able to continue a ealthy relationship with both parents. While the child's need for ecurity in these situations escalates, in many instances it is verlooked. All too often a child is exposed to parents' houghtlessness as the child is used as parents' avenue for expressing nimosity to each other as they attempt to severe their marital elationship. For this reason, and many others, great consideration hould be given to determining which parent will foster a frequent and ontinuing relationship and contact between the child and the non-ustodial parent because of the child's need for that continued ssociation with both parents. See Atkinson at page 25. Indeed, "The est welfare of minor children is promoted by having such children espect and love both parents." *Thurman v. Thurman,* 245 P.2d 810, 814 Idaho 1952).

Utah Code Ann. § 30-3-10(2) states:

> In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate. (1988)

Two benefits can be attributed to ascertaining the most giving parent: (1) "the child has easier access to the security and love of both parents; and" (2) "the parent who is giving is usually more emotionally healthy and a better role model for the child." Atkinson, *supra.*

A number of surrounding states have reviewed the effects of custodial parents interfering with the visitation rights of non-custodial parents and have determined that such actions have a direct bearing on the best interests of the child. Atkinson explains:

> Courts with increasing frequency are changing custody if the custodial parent is interfering with visitation. In extreme cases in which the custodial parent has completely thwarted or severely limited the visitation for several months, the interference with visitation by itself has been a sufficient basis to modify custody."

Atkinson at p. 26. Although Utah, to this point, has not yet ruled on the issue of visitation interference, several other states have determined the circumstances which may allow change of custody to occur:

New Mexico's *Lopez v. Lopez,* 639 P.2d 1186, 28 ALR4th 1, (N.M. 1981), addressed a similar issue as the one at bar. Nancy and Dagoberto Lopez were divorced in 1977 and the custody of their son, Cid, was awarded to Nancy with visitation rights to Dagoberto. From the time of the decree of divorce there were problems with visitation. In February 1979, the

parties agreed to a specific visitation schedule to hopefully resolve the problem, but problems persisted. Cid was moved from New Mexico to Washington D.C., then to California, and later to a different city in New Mexico, all without informing Dagoberto of his whereabouts. Upon locating his son Dagoberto filed for a change of custody, and Nancy was found in contempt of Court for failure to comply with the court ordered visitation rights.

The trial court considered all factors of each parties relationship with Cid, but their overriding consideration was Nancy's "lack of cooperation and prior refusal to follow the trial court order concerning visitation." Annot., 28 ALR4th 1, 5 (1984). The trial court determined that the best interests of Cid would be best served by changing custody to his father. On appeal the Supreme Court of New Mexico observed that when the custodial parent intentionally thwarts or frustrates the visitation rights of the non-custodial parent change in custody is warranted. The act of preventing a child from being with his father is inconsistent with the best interests of the child. *Lopez,* referring to *Marriage of Ciganovich,* 61 Cal.App.3d 289, 132 Cal.Rptr. 261 (1976); and *Entwistle v. Entwistle,* 61 App.Div.2d 380, 402 N.Y.S.2d 213 (1978).

In its own decision (*Hester v. Hester,* 676 P.2d 1338 (N.M.App. 1984)), the Court of Appeals of New Mexico affirmed *Lopez,* holding: "When the custodial parent intentionally takes action to frustrate or eliminate the visitation rights of the non-custodial parent, a change of custody

is an appropriate action."

The Idaho Courts have voiced a similar approval: "Modification of custody of minor children . . . is proper where it appears that the custodial parent has contrived to prevent the other parent from seeing and visiting such children in the manner and spirit provided for in the decree." *Thurman, supra.* 14, at 814.

The Court of Appeals in Arizona was presented with a comparable issue in *Stapley v. Stapley,* 485 P.2d 1181 (Ariz.App. 1971). The Stapley's were divorced in August 1967. In December 1968, after difficulties arose regarding visitation, the father petitioned for a modification in custody to specify his visitation rights. In July 1969, he again petitioned the court, this time for a change in custody due to the mother's refusal to comply with visitation. The court found her in contempt for violating the prior visitation orders and said contempt could be purged upon strict compliance with visitation. The problem continued and again the father petitioned for a change in custody in December 1969. The trial court determined that the best interests of the children would be best served by changing custody to the father.

The Arizona Court of Appeals affirmed the lower court's decision and stated, "Although courts should not change custody as punishment for contempt, we believe it is not inappropriate to consider such conduct both as a change of condition and as a factor in determining the child's welfare." *Id.* The Arizona Court further articulated:

It was not inappropriate to consider the mother's

> conduct which occurred between the time she was awarded custody and the denial of the husband's July, 1969 request for modification in order to show changed conditions.

Id. The Stapley case relates directly to that of the case presently before the Court. Patricia Taylor was found to have made willful attempts to interfere and thwart Scott Smith's visitation rights. Scott made numerous petitions to the court for modification of his visitation. But even after those attempts Patricia was still found to be in contempt of court. (R. 426). As stated in *Stapley,* it would have been appropriate for the lower court to have reviewed the entire record from the initial decree to the date of Scott's petition for change in custody. Had the trial court viewed all the evidence, the material nature of visitation interference would have been more clearly presented to the Court and would have warranted a finding that a material change of circumstances has occurred.

In *Stapley,* the Arizona Court found that the mother had not curbed her animosity towards the father and that she had little regard for court orders, both of which adversely reflected her suitability. With regards to the mother's willful defiance of the court order, the Arizona Court quoted a ruling of the Supreme Court of Washington:

> In assuming responsibility for the custody and care of children of divorced parents, the courts are entitled to expect a custodial parent to assume some responsibility imposed by the court as to the care of a child. In the instant case, Mrs. Sweeny's conduct was not solely a matter of violating a court order or of disrespect for the court. That alone

> is a serious matter and might very well bear upon the determination of a parent's fitness to discipline, instruct, and care for a child. Certainly, a lack of respect for the courts, for law and order, may quite conceivably set an example not conducive to good citizenship or to a well-adjusted character or personality on the part of a child.

Sweeny v. Sweeny, 262 P.2d 207, 213 (Wash. 1953). Parents are role models for their children and when determining custody the courts "shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties." Utah Code Ann. § 30-3-10(1). Patricia Taylor's conduct has demonstrated her willingness to violate or disrespect the orders of the court, which has a bearing on the example she sets for the parties' minor child Jesse. Patricia was found to be in contempt of court but was given the opportunity to purge herself by complying with the visitation rights of Scott. Judge Harding expressed his concerns regarding Patricia's unwillingness to comply with Court orders, and her actions were believed to be a means of avoiding Utah's jurisdiction. (R. 359). In the Memorandum Decision of Judge Harding filed with the Court on December 19, 1988, Patricia was still found to be in contempt of Court despite improvements she had made. The Judge stated that Patricia "as yet had not purged herself of contempt due to her continued uncooperative attitude in regards to visitation." (R.425-27).

A parent's respect for law and order does have a bearing on that parent's suitability in raising a child and is a factor to which consideration should be given in the best interests of a child. *Sweeny, supra. The Colorado and Missouri Courts are in agreement with this statement:*

> When a parent shows little or no regard for the legitimate order of a court relating to custody, that fact is certainly one factor for the court to weigh in considering suitability of who shall have custody of a child along with other facts . . .

Holland v. Holland, 373 P.2d 525 (Colo. 1962).

> Interference with visitation is a factor properly to be considered in determining the welfare of a child for the purpose of measuring the custodial parent's mental attitude toward law and order,' for '[a] person with such little regard for constituted authority can hardly lay claim to being an ideal person to direct the training and upbringing of a young child.'

Garrett v. Garrett, 464 S.W.2d 740 (Mo.App. 1971).

In the case before the Court Scott Smith was granted reasonable visitation in the divorce entered by default. The initial decree did not set forth with enough specificity when and where visitation would occur and so Scott obtained a modification for the purpose of more clearly defining his visitation with his son. Subsequent to the modification Patricia absconded Jesse to Mexico and failed to notify Scott of his son's whereabouts's and denied communication and visitation between father and son. Upon locating his son in Mexico, Scott made numerous attempts to exercise his visitation none to which Patricia would agree. Sometime later, Patricia again relocated herself and Jesse, this time to the State of Arizona and again she failed to notify Scott of Jesse's whereabouts. In September 1983, Scott found out that Jesse was residing in Arizona. (R. 468). On October 5, 1984, Scott attempted to visit his son in Arizona, when he arrived he was denied visitation by Patricia's present husband Steve Taylor. (R. 472-73).

For a period of 37 months Scott was denied his visitation rights with Jesse, and finally the issue of visitation came before Judge Bullock on December 11, 1984.

On December 13, 1984, Judge Bullock reconvened with counsel (R. 571), and presented his conclusions. Judge Bullock termed Patricia's contempt of deliberately denying Scott's visitation as a "violation of the spirit as well as the letter of the Order," and that she would be held in contempt until she purged herself by complying with the visitation schedule. (R. 571-72). Judge Bullock stated, "my intent is not to punish her (Patricia), but simply to convince her that it's for the benefit of everybody to cooperate in giving this kid a relationship with his Dad." (R. 576).

Since Judge Bullock's order Scott has been able to exercise visitation with Jesse, but the father-son relationship has been seriously thwarted by the visitation interference which occurred since August 1981. Although there have been improvements with regards to the accessibility of Jesse, Scott's visitation rights have still been thwarted, and for this reason Scott has sought a change of custody in the best interests of his son Jesse, not merely a modification of his visitation rights.

CONCLUSION

The Fourth Judicial District Court erred in limiting the evidence to be presented in support of Scott Smith's Petition to Modify the Decree of Divorce. Based on the previous decisions of this Court the

change-in-circumstances requirement has a less rigid application when seeking a modification of a default divorce. In December 1984 Patricia was found to be in contempt of court for her defying court orders in regard to visitation. The Court allowed her the privilege of purging herself of said contempt by strictly adhering to the visitation rights of Scott Smith. In December 1988, the Court determined that Patricia had not yet purged herself of contempt. The full ramifications of Patricia's interference with Scott's visitation rights have not been presented to the Court's in light of a petition to change custody.

It is in the best interest of Jesse Smith for the Court to remand this case to the Fourth Judicial District Court so that evidence can be presented relative to Patricia's interference with visitation prior to 1984. Defendant-Appellant Scott Smith prays this court to hold the district court abused its discretion in granting a motion in limine excluding evidence of prior visitation misconduct and remand this matter accordingly.

DATED this 12 day of October 1989.

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid thereon, to the following, this 12 day of October, 1989:

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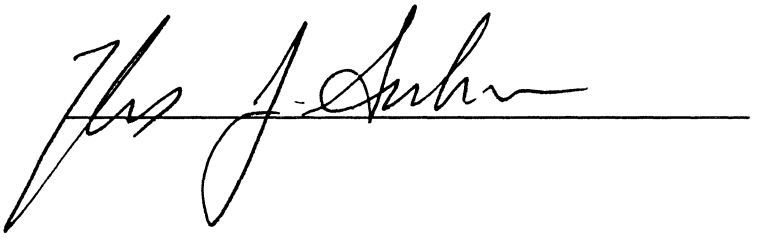

APPENDIX A

UTAH RULES OF CIVIL PROCEDURE - 52
UTAH CODE ANNOTATED, SECTION 30-3-10

30-3-9. Repealed.

Repeals. — Section 30-3-9 (R.S. 1898 & C.L. 1907, § 1213; C.L. 1917, § 3005; R.S. 1933 & C. 1943, 40-3-9), relating to the forfeiture of marital rights by the guilty party in a divorce proceeding, was repealed by Laws 1969, ch. 72, § 26.

30-3-10. Custody of children in case of separation or divorce — Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

History: L. 1903, ch. 82, § 1; C.L. 1907, § 1212x; C.L. 1917, § 3004; R.S. 1933 & C. 1943, 40-3-10; L. 1969, ch. 72, § 7; 1977, ch. 122, § 5; 1988, ch. 106, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, designated the former provisions as Subsection (1), added Subsection (2), and made various stylistic and punctuation changes in Subsection (1).

Cross-References. — Disposition of property and children, § 30-3-5.

Removal of children from homestead, § 30-2-10.

NOTES TO DECISIONS

ANALYSIS

Appeals.

In child custody determinations, the trial court's decision should be upheld on appeal unless the trial court's action is so flagrantly unjust as to constitute an abuse of discretion. Lembach v. Cox, 639 P.2d 197 (Utah 1981), overruled on other grounds, Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

A determination of the "best interests of the child" turns on factors the trial court is best able to assess, and only when the action taken by the trial court is so unjust as to constitute an abuse of discretion should the Supreme Court substitute its own judgment. Hirsch v. Hirsch, 725 P.2d 1320 (Utah 1986).

Application of section.

Where father of an illegitimate child had adopted such child by acknowledgment under § 78-30-12, and the father and mother of the child had never married, the standards of this section were employed in an action between the mother and father for custody of the child. Lembach v. Cox, 639 P.2d 197 (Utah 1981), overruled on other grounds, Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

Concomitant with the rights of a legitimated child adopted by the acknowledgement of its father are the rights of its biological father. In a dispute with the child's mother over visitation rights or custody, the biological father's rights with respect to the legitimated child are adjudicated under the divorce laws codified in § 30-3-5 and this section. Chandler v. Mathews, 734 P.2d 907 (Utah 1987).

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended, effective Jan. 1, 1987.)

Amendment Notes. — The 1986 amendment, in Subdivision (a), deleted "and" preceding "in granting" in the first sentence, inserted the third and fifth sentences, rewrote the sixth sentence and added the last sentence.

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

Cross-References. — Masters, Rule 53.

NOTES TO DECISIONS

ANALYSIS

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE OF DIVORCE

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University Mall - Mez. #210
Orem, Utah 84057
Telephone: 226-2030
Attorney for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATRICIA G. SMITH, Plaintiff, v. SCOTT G. SMITH, Defendant.	FINDINGS OF FACT and CONCLUSIONS OF LAW Civil No. 56264

THIS MATTER was heard before the Honorable J. Robert Bullock, Judge of the above-entitled Court, on the 13th day of April, 1981. Plaintiff was present in Court and represented by Sherwood N. Cook. Defendant was not present in Court. The Court noted that Defendant had executed a Consent and Waiver for Entry of Judgment which had been duly filed with the Court. Upon the basis of record herein and Plaintiff's sworn testimony, the Court, being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a resident of Utah County, State of Utah and has been for more than three (3) months immediately prior to the commencement of this action.

2. Plaintiff and Defendant are wife and husband, having married on June 3, 1977, at Provo, Utah.

3. Plaintiff and Defendant are parents of the following minor child: JESSE MALCOLM SMITH, born October 8, 1978.

4. Defendant has treated Plaintiff cruelly, causing her great mental distress by physically abusing her on

numerous occasions and by refusing to allow her to have contact with her family.

5. The personal property of the parties should be divided as follows:

(a) To Plaintiff: microwave oven; bunkbeds; television set; washer; one dresser; dinette set; vacuum cleaner and all her personal belongings and effects.

(b) To Defendant: couch; waterbed; dryer; stereo; dresser; lawn mower and all his personal belongings and effects.

6. Plaintiff should be awarded the 1975 Vega and Defendant should be awarded the 1967 Camero. Each should assume the obligations associated with their respective vehicles.

7. Plaintiff should not be awarded any sums as alimony.

8. Plaintiff is a fit and proper parent and should be awarded the sole care and custody of the minor child of the parties.

9. Defendant should have rights of reasonable visitation which shall include, as a minimum, the following:

(a) Every other weekend.

(b) One evening during the week that he does not visit on the weekend.

(c) Every other holdiay.

10. Defendant should be ordered to pay to Plaintiff the sum of ONE HUNDRED TWENTY-FIVE ($125.00) DOLLARS per month for the support and maintenance of the minor child of the parties until said child should die, marry or reach the age of majority, whichever should first occur.

11. The debts of the parties should be allocated as follows:

(a) Plaintiff should pay, and hold Defendant

harmless therefrom, the loan from Alpine Credit Union.

(b) Defendant should pay, and hold Plaintiff harmless therefrom, the loan from UP&L Credit Union.

CONCLUSIONS OF LAW

Plaintiff should be awarded a Decree of Divorce containing orders consistent with the above Findings of Fact, to become final three (3) months from date of entry.

DATED this 13th day of April, A.D., 1981.

BY THE COURT:

DISTRICT COURT JUDGE

Sherwood N. Cook
PARKER, McKEOWN, McCONKIE & HILL
University Mall - Mez. #210
Orem, Utah 84057
Telephone: 226-2030
Attorney for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATRICIA G. SMITH, Plaintiff, v. SCOTT G. SMITH, Defendant.	)	DECREE OF DIVORCE Civil No. 56264

THIS MATTER was heard before the Honorable J. Robert Bullock, Judge of the above-entitled Court, on the 13th day of April, 1981. Plaintiff was present in Court and represented by Sherwood N. Cook of PARKER, McKEOWN, McCONKIE & HILL. Defendant was not present in Court. The Court noted that Defendant had executed a Consent and Waiver for Entry of Judgment which had been duly filed with the Court. Upon the basis of record herein and Plaintiff's sworn testimony, and pursuant to the Findings of Fact and Conclusions of Law made in this matter;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is awarded a Decree of Divorce to become final three months from date of entry.

2. The personal property of the parties is hereby awarded as follows:

(a) To Plaintiff: microwave oven; bunkbeds; television set; washer; one dresser; dinette set; vacuum cleaner and all her personal belongings and effects.

(b) To Defendant: couch; waterbed; dryer; stereo; dresser; lawn mower and all his personal belongings and effects.

3. Plaintiff is hereby awarded the 1975 Vega and Defendant is hereby awarded the 1967 Camero. Each shall assume the obligations associated with their respective vehicles.

4. Plaintiff is hereby awarded no sums as alimony.

5. Plaintiff is a fit and proper parent and is hereby awarded the sole care and custody of the minor child of the parties.

6. Defendant shall have rights of reasonable visitation which shall include, as a minimum, the following:

(a) Every other weekend.

(b) One evening during the week that he does not visit on the weekend.

(c) Every other holiday.

7. Defendant is hereby ordered to pay to Plaintiff the sum of ONE HUNDRED TWENTY-FIVE ($125.00) DOLLARS per month for the support and maintenance of the minor child of the parties until said child shall die, marry or reach the age of majority, whichever shall first occur.

8. The debts of the parties are hereby allocated as follows:

(a) Plaintiff shall pay, and hold Defendant harmless therefrom, the loan from Alpine Credit Union.

(b) Defendant shall pay, and hold Plaintiff harmless therefrom, the loan from UP&L Credit Union.

DATED this 13th day of April, A.D., 1981.

BY THE COURT:

DISTRICT COURT JUDGE

APPENDIX C

FINDINGS OF FACT AND ORDER

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATRICIA G. SMITH (TAYLOR),	:	
Plaintiff,	:	**FINDINGS OF FACT AND ORDER**
vs.	:	
SCOTT G. SMITH,	:	Case No. 56,264
		Judge: Ray Harding
Defendant.	:	

The above entitled matter having come on regularly for hearing before the Court on the 13th day of December, 1988, and the Court having heard evidence and having taken the matter under advisement and having made in writing its Memorandum Decision, now enters the following:

FINDINGS OF FACT

1. The Court finds that both parents are fit.

2. The Court finds that there has not been a showing of a material change of circumstance.

3. The Court finds that although the Plaintiff's conduct has improved since she was found to be in contempt of

Court, such improvement has not been sufficient to purge herself and the Court should continue its jurisdiction.

4. The Court finds that the funds held by the Defendant and interest pursuant to the previous Order of the Court should be paid over to the Plaintiff forthwith.

The Court having made in writing its Findings of Fact now enters the following:

ORDER

1. It is hereby ordered that Defendant's Petition to Modify the Decree of Divorce is hereby dismissed.

2. Defendant is ordered forthwith to pay the sums ordered paid to the Plaintiff in the Court's Order of June 2, 1986, and Defendant's subsequent Motion with regard to said Order is hereby denied.

3. Each of the parties is hereby ordered to be cooperative with the other and the parties are further ordered not to make any disparaging remarks about the other in the presence of the minor child of the parties or in a manner in which said minor child will be effected. The parties are further ordered to encourage love and respect to enable the minor child of the parties to have a happy loving relationship with each parent without regard to which one he resides with.

4. The Court hereby orders each of the parties to bear their own attorney's fees and costs.

DATED this 28 day of March, 1988.

BY THE COURT:

RAY M. HARDING
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

WAYNE B. WATSON
Attorney for Defendant

CERTIFICATE OF MAILING

A copy of the foregoing FINDINGS OF FACT AND ORDER was mailed to Wayne B. Watson, Attorney for Defendant, 2696 North University Ave., Suite 200, Provo, Utah 84604; postage prepaid this 30th day of ~~December~~ January, 1988.